Argued by

No. 416

Supreme Court of the United States

October Term, 1948

THE UNITED STATES OF AMERICA,

Appellant,

vs.

WALLACE & TIERNAN COMPANY, INC., ET AL.,

Appellees.

Appeal from the United States District Court for the District of Rhode Island

BRIEF FOR APPELLEES

CHARLES H. TUTTLE
LOREN N. WOOD
WILLIAM H. EDWARDS
Of Counsel

EDWARDS & ANGELL
Attorneys for Wallace & Tiernan Company, Inc., et al.

EDWARD T. HOGAN
LAURENCE J. HOGAN
Of Counsel

HOGAN & HOGAN
Attorneys for Novadel-Agene Corporation, et al.

S. EVERETT WILKINS, Jr.
MATTHEW W. GORING
Of Counsel

HINCKLEY, ALLEN, TILLINGHAST & WHEELER
Attorneys for Builders Iron Foundry, et al.

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BRIEF FOR APPELLEES

This appeal by the United States is from a decree of the United States District Court for the District of Rhode Island, entered August 6, 1948, "dismissing the action without prejudice and the Government's 'request' for judgment and relief prayed for in the complaint is denied" (R. 242).

After the order allowing this appeal had been entered on October 4, 1948 (R. 244), the Solicitor General filed, under Rule 12 of the Supreme Court of the United States, a "Statement as to Jurisdiction". Thereupon the appellees, pursuant to paragraph 3 of the same Rule, did

> "1. File a Statement of Matters and Grounds making against the Jurisdiction of the Supreme Court of the United States; and
>
> 2. Move to dismiss the attempted appeal."

The appellees' paper embodying this "Statement" and "Motion", together with their "Reply Memorandum" answering an opposing memorandum from the Solicitor General, are now on file with this Court, and will be before the Honorable Justices on the argument, by reason of the following direction of this Court on December 28, 1948 (R. 382):

> "The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court and of the motion to dismiss is postponed to the hearing of the case on the merits."

Statement

We believe that we will best aid the Court by setting forth under the ensuing Points the related facts, and by confining our present Statement to correcting the perspective in the appellant's Statement.

(1) On page 7, appellant states that, in granting the appellees' motion for delivery of the photostats, the District Court said that the grand jury subpoenas *duces tecum* issued prior to the indictment "did not violate the Fourth Amendment" (R. 84). This expression by the District Court was an abbreviated repetition of its original denial of the defendants' motions on May 26, 1946 (months before the indictment) to vacate those subpoenas on the ground that they were so unreasonable and oppressive *in scope* as to violate the Fourth Amendment (R. 82). That the court's expression was not a contradiction of any ruling by it after the indictment, is demonstrated by the court's immediately following utterance (R. 84):

> "It seems to me that when the grand jury turned out to be illegally constituted and the indictment was

dismissed that the subpoenas amounted to unreasonable searches and seizures in violation of the Fourth Amendment."

(2) The indictment (No. 6055) was filed on November 18, 1946. Promptly thereafter the defendants moved to dismiss it and for the return of the subpoenaed documents on the ground that the "grand jury" had, as against the defendants, no status or authority in law and that its actions had violated the defendants' constitutional rights (R. 89).

These motions were granted by a final decision on March 19, 1947 (R. 56, 70). Both in the court below and in this Court, the appellant has announced that it "accepted" that decision as "correct" (R. 102; and appellant's "Statement as to Jurisdiction", p. 3); and, in consequence, did not exercise the right which it admittedly had to appeal (*id.*). The appellant immediately complied; forthwith returned all the subpoenaed papers; and the so-called "grand jury" and its so-called "investigation" immediately and automatically ceased to exist. (For a more extended statement, see Point I, *post.*)

Instead of summoning a new grand jury, the Justice Department, on May 1, 1947, filed a "Criminal Information (docket No. 6070)", making (as the appellant's brief concedes, p. 7), "the same charges against the same defendants as those made in the indictment (No. 6055) which had been dismissed."

(3) After unsuccessful demands on April 7, May 2 and May 5, 1947 (R. 50, 79, 80), the defendant, on May 9, 1947, petitioned for delivery to them of all photostatic copies which the Justice Department had made of the subpoenaed papers while it and the "grand jury" had them in their possession (R. 76-80).

This petition was an independent and separate proceeding entitled "In the Matter of Motion of Wallace & Tiernan Company, Inc., et al., for Return of Documents"; and it was given a separate docket number, to wit: "Misc. 5347" (R. 75, 76). No counter-affidavit or other proof was filed by the Justice Department (R. 50, 82). The petition was granted by a decree entered February 18, 1948 (R. 85); and the Justice Department's motion for a stay was denied by order entered April 20, 1948 (R. 86). The Justice Department took no appeal; and forthwith complied by delivering the photostats. (For a more extended statement, see Point V, *post*.)

(4) On July 25, 1947, the defendants made a motion in the "Information Action (No. 6070)" to dismiss the Information or, in the alternative, for (R. 87):

> "An order precluding and restraining the United States from using in any way or for any purpose any knowledge, information or evidence obtained from or contained in any of the aforesaid illegally seized papers and documents."

The grounds of the motion were the violations of the Fourth and Fifth Amendments, the Department's failure to appeal from any of the foregoing decisions of the District Court, and the consequent finality thereof in law as *res judicata* and finality in fact by compliance (R. 351-9). By opinion, dated April 14, 1948, the District Court denied the motion to dismiss the Information but granted the aforesaid alternative relief by way of preclusion (R. 91-95). Decree accordingly was entered April 20, 1948 (R. 95, 96). Once again, the Justice Department did not appeal. (For a more extended statement, see Point VI, *post*.)

(5) Thereafter, the Justice Department sought *in the civil action* to challenge the aforesaid decisions and to attempt to use the civil action as a medium for reargu ing and, by indirection, for subjecting to appeal the decree of March 19, 1947, dismissing the indictment (No. 6055) and directing the return of the subpoenaed papers, the decree of February 18, 1948, directing the delivery of the photostats to the defendants, and the preclusion decree of April 20, 1948.

The appellant embodied this attempt in the following (R. 34-6, 46, 136-181):

1. Motion on April 14, 1948, in the civil action, to vacate the order of February 18, 1948, directing delivery of the photostats;

2. Motion on April 14, 1948, in the civil action, under Rule 34, for discovery of the original papers which had been photostated;

3. Motion on April 22, 1948, in the civil action for production of the photostats themselves;

4. New subpoenas *duces tecum*, dated May 12, 1948, in the civil action, requiring production at the trial of the civil action of the original papers which had been photostated.

The defendants moved to quash these civil subpoenas (R. 182-192).

All these motions by the Justice Department were denied and the civil subpoenas were quashed by the District Court on the ground, among others, that (R. 303):

> "It seems to me that these motions are an attempt on the part of the Government to reargue in this civil action matters which have been decided in the criminal case and from which the Government did not appeal."

(For a more extended statement, see Point VIII, *post*.)

(6) At the hearing on April 20, 1948, the Justice Department's spokesman (Mr. Kelleher) requested the court to set a date for "trial", and said that, if the Department's aforesaid motions were denied (R. 197):

> "we are prepared to announce to the Court that the Government is unable to proceed further in the trial of the case; that the Government has no evidence of any substantial amount on the basis of which it can go ahead with the trial; and we will, therefore, suggest to your Honor that you enter *judgment with prejudice against the Government* and from that judgment we shall appeal directly to the Supreme Court of the United States." (Italics ours.)

At the hearing on May 24, 1948, Mr. Kelleher modified this statement by saying that he might suggest a judgment "without prejudice" against the Government (R. 198). He also asked for a date for trial and said that he would assure defendants' counsel that, at the trial, "the Government does not intend to offer evidence" (R. 198, 203).

At the opening of the "trial" on June 2, 1948, Mr. Kelleher again repeated his assurance that the Justice Department was not asking for and would not conduct a "trial" "in the usual sense of the word" (R. 204).

Mr. Kelleher further said (R. 204).

> "Mr. Kelleher: I think it will become clear as we proceed this afternoon that the defendants will not be prejudiced in any way by not being prepared to put witnesses on the stand or to cross-examine the witnesses at this time."

This extraordinary "trial" then took the form of an "opening statement" by Mr. Kelleher and an accom-

panying affidavit by himself (R. 206-07, 229-32) in which, referring to other evidence not inhibited by the aforesaid prior decisions, he said (to quote the affidavit, R. 231):

> "Furthermore, the Government has no present knowledge of the existence of other evidence sufficient to establish the violations of the Sherman Act charged by the complaint, and, although conceivably such evidence might be obtained, that could only be done after an investigation co-extensive in time and labor with that heretofore undertaken. In short, therefore, the Government's case in its present posture can be proved only by the subpoenaed documents."

Mr. Kelleher also called his associate (Mr. Karsted) as a "witness" (R. 210), and asked him whether, in the course of his participation in the investigation by the "Grand Jury", he had examined certain of the documents which were among those ordered by the court to be returned to the defendants (R. 210-13). The objections of defense counsel to this questioning were on numerous grounds and were sustained (R. 210-13).

Mr. Kelleher then announced that "the plaintiff rests" (R. 219); and defense counsel rejoined: "Your Honor, I cannot conceive what I am called upon to say or do" (R. 219). Thereupon Mr. Kelleher, having himself placed no evidence on the record, made the extraordinary request that the court "enter judgment for the plaintiff and the relief prayed for in the complaint" (R. 220).

Briefs were submitted; and, on August 6, 1948, the court made a decision in the very form which, at the hearing on May 24, 1948, Mr. Kelleher had suggested, to wit: a judgment without prejudice against the Government (R. 198).

The formal judgment, *submitted by the Justice Department*, was entered on September 3, 1948, adjudged as follows (R. 375-6):

"That the Government's 'request' for judgment and relief prayed for in the complaint is denied and the action is dismissed without prejudice."

(For a more extended statement, see Point X, *post.*)

The Appellees' "Statement against Jurisdiction" and "Motion to Dismiss".

As already stated, the appellees filed with this Court at the outset a printed "Statement Making Against Jurisdiction" and a "Motion to Dismiss".

Also, as already stated, this Court has reserved decision thereon until "the hearing of the case on the merits" (R. 382).

Since the appellees' Statement and Motion and their Reply Memorandum are now before the Court, we shall not, in this brief, undertake to repeat.

We believe that the grounds both of the Objection to Jurisdiction and of the Motion to dismiss are sound.

The two cases relied on in the appellant's brief (pp. 24-6), to wit: *Wecker* v. *National Enameling Co.*, 204 U. S. 176, and *Bowles* v. *Beatrice Creamery Co.*, 146 F. 2d 774, have no bearing.

In the *Wecker* case, the complaint was dismissed "upon motion of the defendant" (p. 180). For this and other obvious reasons, the appellant's brief is plainly mistaken in asserting that this *Wecker* case "is inconsistent with the ruling in *Rudolph* v. *Sensener*, 39 App. D. C. 385", cited on page 14 of our "Statement against Jurisdiction and Motion to Dismiss".

In the *Bowles* case, the question of appealability was not considered in the opinion and apparently had not been raised. Moreover, the report does not show whether or not the dismissal was on motion of the defendant. Fur-

thermore, the Administrator introduced his *other* evidence, and conducted a real trial.

In the instant case, the plain fact is that, as the appellant's spokesman twice conceded (R. 203-4), the Justice Department, although admitting the existence of other evidence (R. 206-7, 231-2), was not undertaking to try the case "in the usual sense of the term" or to bring forward any real witnesses "or any other evidence" (R. 207). Avowedly, it was merely using the occasion for an altogether different and ulterior purpose (R. 102), namely: immediately to invite and obtain by a few gestures a quick dismissal without prejudice as an artificial means of attempting to subject to appeal final decrees in other and different proceedings from which it had taken no appeal (R. 102, 204, 207), —thus leaving itself with a second string to its bow, *i.e.* the right to bring a new suit on other evidence if it lost the projected "appeal".

POINT I

By choosing not to appeal from the final decision of March 19, 1947, dismissing the indictment, annulling "the grand jury investigation", and ordering return of the seized papers, the appellant made applicable as between it and these defendants the principles of *res judicata*, and concluded itself for all purposes and in all actions as to all issues of fact and law, explicit and implicit, embraced in that decision.

It announced to the Court below, and has announced to this Court, that it "accepted" that decision as "correct" and chose not to appeal.

A

This decision of March 19, 1947, was final and immediately appealable to this Court.

(1) The filing of the indictment on November 18, 1946 (R. 251) was promptly followed by the defendants' motions to dismiss the indictment and for the return of their seized papers (R. 72, 82, 83). The grounds of the motions were that the "special grand jury was not legally organized and that the indictment which it purported to find did not constitute due and constitutional process" (R. 89).

The Court's determination on both these motions was orally announced as its "decision" in open court on March 19th, 1947 (R. 56-70). It was based (R. 69) on *Ballard* v. *United States*, 329 U. S. 187, and *Zap* v. *United States*, 330 U. S. 800.

As to the dismissal of the indictment, the Court's closing judgment was (R. 70):

> "The defendants' motions to dismiss are granted, and it becomes unnecessary for the Court to consider

other grounds alleged in the motions. The defendants are discharged and the bail is discharged."

As to the return of the documents, the Court's closing judgment was (R. 49, 307):

> "The Court: There is no need of further discussion on this because the Court has already ruled the Grand Jury was illegally constituted. These papers were obtained as a result of subpoenas issued by an illegally constituted Grand Jury. Certainly defendants have a right to the return of their property under those circumstances. The motions for the return of the impounded documents are granted."

Both these rulings were corollary to the basic decision, to wit, the voiding of the "Special Grand Jury" and its "investigation" (R. 69, 70).

In a decision filed on February 6, 1948, granting the defendant's motion for delivery of the photostats, the District Court pointed out as follows some of the elements of its decision of March 19, 1947 (R. 84):

> "It seems to me that when the grand jury turned out to be illegally constituted and the indictment was dismissed that the subpoenas amounted to unreasonable searches and seizures in violation of the Fourth Amendment."

(2) The decision on March 19, 1947, was in itself a final, complete and self sufficient adjudication (R. 56, 70, 307). The fact that formal orders were entered was merely confirmatory (R. 70-5). The appellant could have immediately appealed direct to the Supreme Court of the United States (U. S. C. A. Title 18, 682; Rule 12 of the Federal Rules of Criminal Procedure). Such appealability is conceded. (See next Subdivision.)

A motion to quash an indictment is a "plea" within the meaning of Title 18, §682, permitting a direct appeal to the Supreme Court of the United States from a judgment dismissing an indictment. (*United States* v. *Hark*, 320 U. S. 531, 535-6; re-hearing denied, 321 U. S. 802). By Rule 12 of the Criminal Rules, pleas in bar and similar pleas are replaced by motions to dismiss. A motion to dismiss an indictment for intentional and systematic exclusion of women from the grand jury, is proper under this Rule. (*Ballard* v. *United States*, 329 U. S. 187, 190; *Zap* v. *United States*, 330 U. S. 800.)

B

This appellant chose to "accept" as "correct" the decision of March 19, 1947; and to render it, as between these parties, conclusive in law by not appealing and conclusive in fact by compliance.

(1) The appellant deliberately chose not to exercise its admitted right to appeal. It has repeatedly averred as its reason that it believed the determination to be "*correct*".

Thus, in the hearing of April 20, 1948, Mr. Kelleher, special assistant to the Attorney General (R. 272), said (R. 102):

> "Mr. Kelleher: We also *accepted* your Honor's ruling on the validity of the Grand Jury as *correct*. We abided by that. In the performance of our public duty we found that it was necessary for us to conclude that the District Court here was *not in error* and that, therefore, the Government should not appeal from that rule." (Italics ours.)

and again (R. 123-4):

> "Mr. Kelleher: I have explained the reason we didn't appeal. * * * I have explained that, that the Government felt your Honor was right."

Indeed, the appellant's own "Statement as to Jurisdiction", signed by the Solicitor General and submitted to this Court in October, 1948, admitted (p. 3) that the plaintiff, "believing this decision correct," did not exercise its right to appeal. This admission is now repeated in its brief (p. 49).

This deliberate choice not to appeal is the more significant because the Court had informally urged the Government to appeal in order to obtain a final ruling from the United States Supreme Court on the questions involved (R. 48).

(2) The appellant has also conceded that the indictment was founded on these seized papers (R. 51, 361), and that embraced in its acceptance of the final decision of March 19, 1947 was that part of it which required the Justice Department to return the seized papers. To quote the appellant's brief (pp. 30, 31):

> "The order releasing the documents from the impounding order was *ancillary* to the order dismissing the indictment. Since it merely directed the return of the original documents to the appellees, there was no reason for the Government to appeal from such order." (Italics ours.)

Thus, the appellant fully agrees with the statement of the District Court that the direction for the return of the papers was "ancillary to the dismissal of the indictment" and the invalidating of the "grand jury" (R. 108), —a decision which it formally has "accepted" as "correct" (R. 102, 123-4).

In the landmark case of *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, the Justice Department, precisely as in the present case, was ordered to return to the corporation the original documents unlawfully seized under color of grand jury subpoenas but endeavored to

retain its photostatic copies and thereafter to re-subpoena the originals for a new proceeding against the same corporation and officers. This Court held that the "return of the originals" in no way cured the original violation of the corporation's rights under the Fourth Amendment, and that the Justice Department could not keep the photostats, or re-obtain the originals, or use the evidence acquired therefrom, in any new proceeding or "at all." (pp. 391-2).

C

Hence, the conclusiveness of the decision of March 19, 1947, has, between these parties and as to all issues involved, the finality both of *res judicata* and of compliance by this appellant.

(1) As said by this Court (per Mr. Justice Frankfurter) in *Angel* v. *Bullington*, 330 U. S. 183, it is an elementary principle of *res judicata* that (p. 186)

> "An adjudication bars future litigation between the same parties not only as to all issues actually raised and decided but also as to those which could have been raised."

There, in a suit begun in a court of North Carolina, the plaintiff had challenged a certain state statute as void under the Federal constitution. The Supreme Court of North Carolina, in dismissing the suit, disclaimed any intent to pass on any question of "substantive law". Nevertheless, the Supreme Court of the United States held that, notwithstanding this disclaimer, the constitutional question was necessarily involved and hence adjudicated; and that, when the plaintiff later began in the Federal Court in Virginia a new suit on the same claim against the same defendant, the decision of the North Carolina

Supreme Court must be accepted therein by all courts (including even the Supreme Court of the United States) as a conclusive adjudication between the parties of that constitutional question. This Court further said (p. 187):

> "That the adjudication of federal questions by the North Carolina Supreme Court may have been erroneous is immaterial for purposes of *res judicata*. *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 325."

In *Southern Pacific Railroad* v. *United States*, 168 U. S. 1, the Court said (pp. 48, 49):

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subseqnent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

In *Frank* v. *Mangum*, 237 U. S. 309, this Court said of *res judicata* (p. 333):

> "*The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction.*" (Italics ours.)

In *United States* v. *Oppenheimer*, 242 U. S. 85, this Court upheld, as governed by *res judicata*, a motion to quash an indictment because of a prior adjudication that a former indictment for the same offense was barred by the Statute of Limitations. This Court said (p. 87):

"A plea of the statute of limitations is a plea to the merits, *United States* v. *Barber*, 219 U. S. 72, 78, and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution."

(2) The doctrine of *res judicata* is equally applicable in and to all actions whether the first final determination is in a criminal or in a civil action. (See Point VII, *post*.)

D

Thus, under the decision of March 19, 1947, it is the law of this case that, as regards these defendants, the "Special Grand Jury" had no status or authority, that its so-called "investigation" was invalid, and that its compulsory seizure, search and use of the defendants' papers were a violation of the Fourth Amendment.

Judge Hartigan's decision of March 19, 1947, concluded with the following statement of its *ratio decidendi* (R. 70):

"It, therefore, seems that in the interest of justice this Court, in view of the *Ballard* and *Zap* cases, is in duty bound to grant the motions of the defendants in these cases."

In the hearing of September 8, 1947, on the defendants' motion for the delivery of the photostats, the appellant's counsel argued that, although "the Grand Jury" was invalid, its subpoena was valid because "the process is the court's process" (R. 329). To this argument Judge Hartigan replied (R. 329):

"The Court: Assuming for a moment it is a legal subpoena of the Court, has the Court a right to order somebody to go before an illegal body and produce the papers mentioned in that subpoena?

Mr. Kelleher: My point is this: The Court has the right to order the investigation in this instance. There is no question about this Court's right to order an investigation of these companies to determine whether there had been a violation of the Sherman Act.

The Court: Investigation by whom?

Mr. Kelleher: A Grand Jury.

The Court: What kind of a Grand Jury.

Mr. Kelleher: A lawful Grand Jury.

The Court: This wasn't a lawful Grand Jury."

And later, at the same hearing, there was the following colloquy between appellant's counsel and the Court (R. 334):

"Mr. Kelleher: My position is this Court had the power to order the production of those documents for a Grand Jury investigation.

The Court: An illegal Grand Jury? This Court hasn't any right to subpoena documents except for some proper purposes. The proper purpose there was for a legal Grand Jury but it turned out to be—"

In his decision of February 6, 1948, granting the defendants' motion for the delivery of the photostats, Judge Hartigan said (R. 84):

"It seems to me that when the grand jury turned out ~~to be~~ illegally constituted and the indictment was dismissed that the subpoenas amounted to unreasonable searches and seizures in violation of the Fourth Amendment."

In the argument of appellant's counsel on April 20, 1948, in support of his motion to stay the court's decree for the delivery of the photostats, he asked for a stay until

certain possible procedure on his part in this civil action. In denying the stay, Judge Hartigan said (R. 109):

> "The argument, it seems to the Court, is in effect asking the Court to do something that the Court has already indicated is *in violation of the constitutional rights of the defendants here, and I refer to the opinions which are on file in the case.* • • •
>
> The Court has already ruled, as I have stated, that in its opinion *the constitutional rights of the defendants have been violated* and it has issued orders for the return of not only the original documents involved in these cases, but also the photostats of the said original documents." (Italics ours.)

E

The basic formulation in the appellant's brief flatly contradicts its previous concessions and assertions and the conclusiveness which it itself gave to the final decision of March 19, 1947.

(1) As to the "Special Grand Jury", the appellant's brief now rests itself on this opening and extraordinary major premise in its Point III (p. 36):

> "The grand jury had more than *de facto* existence, and its proceedings had legal validity."

This major premise is in complete contradiction of the appellant's spokesmen in the District Court. They had no hesitancy in declaring the grand jury "illegal", "unlawful", and "invalid", and in declaring the concurrence of the Department of Justice in the decision of the District Court to that very effect (R. 102, 103, 120, 123-4, 305, 322-3).

We are not enlightened, anywhere in the appellant's brief as to what meaning lies behind these studiously indefinite words: "The grand jury had more than *de facto* existence."

As early as the hearing of March 19, 1947, in response to the Court's statement that the papers were gotten from the defendants "as a result of an illegal process", Mr. Karsted, Special Attorney for the United States (R. 294), replied: "*That is right*, your Honor" (R. 305). (Italics ours.)

In the hearing on April 20, 1948, his associate, Mr. Kelleher, referred to the subpoenas as "issued on behalf of the illegal Grand Jury" (R. 103). In the hearing on September 8, 1947, Mr. Kelleher twice spoke of "the unlawfulness of the Grand Jury" (R. 322, 323).

Moreover, inherent in the appellant's concessions that the decision of March 19, 1947, was "correct," is recognition of the illegality of the "Grand Jury" and its so-called "Investigation."

If, as is now suddenly and surprisingly asserted (appellant's brief, p. 36), "its (the "grand jury's") proceedings had legal validity", why did the spokesmen of the Justice Department assure the court below, as late as April 20, 1948, that the Department "*accepted* your Honor's ruling on the validity of the Grand Jury as correct"? (R. 97, 102.)

For applicable judicial decisions, see Point IV, *post*.

POINT II

Moreover, quite aside from the acceptance and conclusiveness of the decision of March 19, 1947, the "Special Grand Jury" was a nullity as a matter of law.

Since, as against the accused (these defendants), the "Special Grand Jury" was without authority in law, its purported process and proceeding, whether by its indictment of them or by its seizure, search and use of their papers, were without authority in law, and also:

(a) were not a process and proceeding "of a Grand Jury" under the Fifth Amendment;

(b) were not "due process of law" under the Fifth Amendment; and

(c) were "unreasonable" under the Fourth Amendment.

A

The fallacy that the "search was a valid search."

In development of its present major premise (quoted in full in subdivision E of Point I, *supra*) that the "Special Grand Jury's" "proceedings had legal validity" (pp. 35, 36), the appellant's brief next says (p. 38):

> "The subpoenas by which the documents involved in this case were produced before the Grand Jury were, therefore, valid legal process, and the production of documents pursuant thereto, if it was a search, was a valid search."

We have already challenged the major premise, and we now challenge this development of it.

(1) The appellant's reasoning has this obvious fallacy: It concedes that the "Special Grand Jury" was without authority in law to indict the defendants, but it claims that that illegal body nevertheless had authority in law to seize, search and use their papers for the purpose of indicting them.

In other words, it could not lawfully indict, but it could lawfully sit to indict! It had no lawful power to accomplish the sole objective for which it was called by the Department of Justice (R. 43), but it could lawfully try so to do! It could not lawfully accuse the defendants of criminality, but it could rifle the defendants' private papers to see and find if they were criminals!

The Department of Justice, so its brief now runs, could not lawfully ask this body to accuse the defendants, but it could use this body to compel the submission to itself of evidence for its own accusation of the defendants criminally and civilly!

All this, we submit, is, as pointed out by the court below (R. 84, 85), analogous to the fallacy condemned by this Court in *Johnson* v. *United States*, 333 U. S. 10, 16, to wit: The Department justifies the seizure and search by the objective of indicting and at the same time justifies the objective of indicting by the alleged results of the seizure and search. As this Court said in the *Johnson* case (p. 16, *supra*):

> "'Thus the Government is obliged to justify the arrest by search and at the same time to justify the search by the arrest. *This will not do.*" (Italics ours.)

(2) The subpoenas *duces tecum* were solely for the "Special Grand Jury." They were entitled: "*In Re Special Grand Jury Proceedings.*" Their body, as read into the Record by Mr. Tuttle, was (R. 83, 314)*:

* The full text of the body of the subpoenas appears on page 21 of our printed "Statement Against Jurisdiction and Motion to Dismiss" now before this Court.

> "YOU ARE HEREBY COMMANDED to appear before the Special Grand Jury of the District Court of the United States for the District of Rhode Island * * * and that you bring with you and produce at the time and place aforesaid"—to wit, before the Special Grand Jury—these "papers * * * and to testify concerning certain matters under investigation by the Special Grand Jury * * *."

Obviously, these subpoenas were issued solely for the purposes of the Grand Jury and the "investigation" by it, at the instigation of the Department of Justice, into "the chlorinating equipment manufacturing industry", including these defendants (R. 38, 43, 83). There was no other purpose or authority for their issuance. There was no other body to or for whom the compulsory production was to be made, or the power of search and use given. No action, civil or criminal, was pending.

The "investigation" by the Grand Jury was an independent inquiry and was docketed as "Misc. No. 5301."* It was secret, *ex parte*, and solely to enable "the grand jury" to determine whether an indictment should be voted.

Judge Hartigan would have had no authority to subpoena any papers for investigation by himself (*In re Pacific Telephone and Telegraph Co.*, 38 Fed. 2nd 833, 836), and never purported to do so. These subpoenas were not issued at his instigation. As he said in the course of the argument on March 19, 1947, upon the defendants' motion for the dismissal of the indictment and for the return of the subpoenaed papers (R. 306):

> "The Court. All of these documents were obtained as a result of subpoenas issued at the instance of the Grand Jury, which we have held to be an invalid Grand Jury."

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* See page 20 of our printed "Statement Against Jurisdiction and Motion to Dismiss" now before this Court.

And, at another point (R. 315), Judge Hartigan referred to the papers as brought up at the instigation of the Grand Jury

> "for its purpose and for inspection by the Department of Justice as the agents of the Grand Jury designated by the Grand Jury for the purpose."

At the hearing on April 20, 1948, on the appellant's motion to stay the order for the delivery of the photostats to the defendant, the appellant's counsel (Mr. Kelleher) referred to the documents as obtained "by reason of the subpoenas issued on behalf of the illegal Grand Jury"; and his associate (Mr. Karsted), in an affidavit verified April 14, 1948, referred to the documents as "produced by those companies in response to Grand Jury subpoenas *duces tecum*" (R. 38).

In short, these subpoenas were typical Grand Jury subpoenas issued in a Grand Jury proceeding described as a Grand Jury "investigation", at the instance of the Grand Jury, and calling for production before the Grand Jury.

(3) The law is well settled that grand jury subpoenas *duces tecum* constitute compulsory production and seizure, followed in the nature of things by search and use, of property and papers.

The law is also well settled that, if such compulsory production is for, and such resultant seizure, search and use are by, a purported grand jury having no authority in law, or by representatives of the Department of Justice in aid of such an illegal body, the Fourth and Fifth Amendments have been violated and the property "so secured may be regained".

As said in *Weeks* v. *United States*, 232 U. S. 383, 397:

> "While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd* case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpoena duces tecum*, against which the person, be he individual or corporation, is entitled to protection."

In *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, the opinion of this Court has the following footnote at page 202:

> "'In other words, the subpoena is equivalent to a search and seizure and to be constitutional it must be a *reasonable* exercise of the power.' Lasson, Development of the Fourth Amendment to the United States Constitution, 137, citing *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; *Hale* v. *Henkel*, 201 U. S. 43, 76. Cf. *Boyd* v. *United States*, 116 U. S. at 634-635 (as to which see also notes 33 and 36: '* * * we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited * * * is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment.'"

In *Feldman* v. *United States*, 322 U. S. 487, this Court said (per Mr. Justice Frankfurter) (p. 492):

> "When a representative of the United States is a participant in the extortion of evidence or in its illicit acquisition, he is charged with exercising the authority of the United States. Evidence so secured may be regained, *Go-Bart Co.* v. *United States*, 282

U. S. 344, and its admission, after timely motion for its suppression, vitiates a conviction. *Byars* v. *United States*, 273 U. S. 28."

(4) This language is peculiarly applicable to the present case because it is obvious that the representatives of the Department of Justice were the operators of the subpoenas *duces tecum*.

Indeed, they have admitted that it was they who also conducted the "organization and arrangement" of the siezed papers so that they could be "intelligently understood and evaluated by the Grand Jury" (R. 315).

In *Go-Bart Co.* v. *United States*, 282 U. S. 344, this Court said (p. 357):

> "It (the Fourth Amendment) is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent."

Obviously, a seizure and search which is unlawful, or by or for a body not authorized, or by the Department of Justice as the agent of such body, is *per se* "unreasonable" within the meaning of the Fourth Amendment.

In consequence, this Court has interpreted the Fourth Amendment as operative against the indirect, as well as the direct, use of evidence obtained in violation thereof. To quote from *Goldstein* v. *United States*, 316 U. S. 114, 120:

> "It has long been settled that evidence obtained in violation of the prohibition of the Fourth Amendment cannot be used in a prosecution against the victim of the unlawful search and seizure if he makes timely objection. This, for the reason that otherwise the policy and purpose of the amendment might be thwarted. And we have further held that the policy

underlying the amendment cannot be circumvented by the indirect use against the victim of evidence so obtained."

B

The fallacy of disregarding the Fifth Amendment.

Furthermore, it is obvious that the purported process and proceeding by a "grand jury" acting without authority in law, whether by indictment or by seizure and search of papers, are not "due process of law", and do not constitute a proceeding "of a Grand Jury" within the meaning of the Fifth Amendment,—quite aside from being "unreasonable" and illegal under the Fourth Amendment.

The relation in this field between the Fourth and Fifth Amendments has been pointed out as follows by this Court (per Mr. Justice Frankfurter) in *Feldman* v. *United States*, 322 U. S. 487, 489:

> "We are immediately concerned with the Fourth and Fifth Amendments, intertwined as they are, and expressing as they do supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy."

And in *Zap* v. *United States*, 328 U. S. 624, this Court said (per Mr. Justice Douglas) (p. 628):

> "As we pointed out in *Davis* v. *United States, ante*, p. 582, the law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments."

And, as said in *Hall* v. *United States*, 168 F. 2d 161 (C. A. D. C.) (p. 164):

> "The due process clause of the Fifth Amendment would be invokable if the authorities charged with the duty of selecting jurors had systematically excluded Negroes from the panel."

It is obvious that a body, having no lawful power to indict anyone, can have no lawful power to conduct an "investigation" for the purpose of determining whether it should find an indictment, —and, a *fortiori*, no lawful power to compel submission of private books and papers for search and use in aid of such an "investigation" and of a possible indictment of their owners.

Since an indictment by such a body is not and cannot be "due process of law" and must be annulled upon timely challenge by the accused (as was done in this case, R. 84), the proceeding of such body toward such an indictment is equally void of "due process" as against the accused; and also such body cannot be the duly constituted and authorized grand jury required by the Fifth Amendment.

If the "grand jury" has no lawful authority to indict, it has no lawful authority to sit to indict.

When timely and competent challenge is made, there can be, as against the party in jeopardy, no dividing line between legal and illegal action by an illegal "grand jury". The status of illegality is then *ab initio*. It excludes "a strange interlude" of legality.

C

The fallacy that "the Government had a Right to See."

A further fallacy in the appellant's brief is illustrated by its own sub-heading on page 39:

> "B. The Production of Documents Which the Government Had a Right to See Pursuant to Subpoena Reasonable in Scope Was Not a Search Within the Meaning of the Fourth Amendment."

We do not know to whom or to what the appellant thus refers as "the Government". In the administration of justice in the courts the Justice Department is not "the Government". It is merely the attorney for a party

before the judicial branch of the United States Government.

Furthermore, the Justice Department, if by the subheading it is referring to itself, had no "right" whatever to "see" any documents except as an agent for a lawfully constituted and constitutional grand jury. The Justice Department has no "right" to subpoena documents for production before and inspection by itself; and, *ex officio*, it has no right to enter private premises and "see" private papers.

Nor has a "grand jury" any such compulsory right to "see", unless it is a body lawfully constituted and authorized to act as a constitutional grand jury.

D

The fallacy as to "the castle wall."

The appellant's brief (pp. 18, 40) attempts to draw some distinction between what it calls "an actual search and seizure" on the one hand, and a "figurative or constructive" search on the other.

But once again the appellant can find no escape by resort to a form of words. We are dealing here with substantive rights, with the two constitutional guaranties which are the most basic in our whole free society, and with a vast area of civil liberties which cannot be wiped out by a mist of words.

The appellant's argument proceeds as if, in case of a subpoena *duces tecum*, all there were to a citizen's constitutional rights is the question whether the subpoena was "reasonable in scope". It overlooks that both the Fourth and Fifth Amendments require, not only that it shall be reasonable in scope but also that it shall proceed from lawful authority and with the lawful purpose of putting the papers into hands lawfully authorized to search, use and retain them.

The case of *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 202, cited at page 40 of the appellant's brief, intimates in no way that merely because a purported subpoena *duces tecum* is "reasonable in scope" that, therefore, it is fully constitutional and merely a "figurative or constructive" search.

That decision expressly declares that, under the Fourth Amendment, the subpoena must not only be sufficiently definite, reasonable in scope, and relate to relevant matters, but also be "*one the demanding agency is authorized by law to make* (p. 208).

Premises can be entered and private papers taken and subjected to search even more effectively by purported compulsory process and the coercion of color of authority than by force of arms. To imply, as does the appellant's brief (p. 41), that the Fourth and Fifth Amendments are applicable only when a "*castle wall is breached*", is to open in the castle wall with which the Constitution surrounds the most sacred private rights and liberties a massive breach for the entrance of the police state.

The ramparts of personal liberty are not stones and mortar.

In *Gouled* v. *United States*, 255 U. S. 298, this Court said, concerning the central importance of the Fourth and Fifth Amendments (p. 303):

> "It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd* v. *United States*, 116 U. S. 616, in *Weeks* v. *United States*, 232 U. S. 383, and in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments."

E

The fallacy in the proposed restriction upon the Fourth Amendment.

The appellant's brief attempts to restrict the Fourth Amendment to what it calls and interprets narrowly "the right of privacy" (p. 41).

There is no such restriction. The Amendment is for the protection of the whole American concept of personal security and liberty.

As said in *Harris* v. *United States*, 331 U. S. 145 (*per* Chief Justice Vinson) (p. 150):

> "This Court has consistently asserted that the rights of privacy and *personal security* protected by the Fourth Amendment '* * * are to be regarded as of the very essence of constitutional *liberty*; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen * * *.' *Gouled* v. *United States*, 255 U. S. 298, 304 (1921)." (Italics ours.)

F

The fallacy of indirection in avoidance of the Fourth and Fifth Amendments.

The appellant's argument comes down to the defense of *indirection* in avoidance of the illegality of *direction*.

Our constitutional guarantees are too rugged and too precious to admit of such circumvention.

In *Nardone* v. *United States*, 308 U. S. 338, this Court said (*per* Mr. Justice Frankfurter) (p. 340):

> "To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'incon-

sistent with ethical standards and destructive of personal liberty.' What was said in a different context in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392, is pertinent here: 'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.' See *Gouled* v. *United States*, 255 U. S. 298, 307."

Indeed, in a criminal case, evidence obtained in violation of "civilized standards of procedure and evidence", will be suppressed even if not outlawed by express constitutional prohibition. (*McNabb* v. *United States*, 318 U. S. 332, 340-1; *Nardone* v. *United States*, 308 U. S. 338, 342.)

G

The analogy from search warrants.

An eloquent and pertinent analogy is furnished by cases of search warrants which have been actually issued by a magistrate and executed by an officer of the law, but where the proof submitted to the magistrate did not establish probable cause or was not sufficiently definite.

In such case, notwithstanding that the magistrate was *de jure* and personally authenticated the warrant with his own hand and seal, the party aggrieved may secure the judicial annulment of the warrant, the return of the property and papers seized, and the suppression and exclusion of any evidence derived therefrom, notwithstanding "that the search was successful in revealing evidence of a violation of a federal statute".

Byars v. *United States*, 273 U. S. 28, 29; and cases there cited;
Weeks v. *United States*, 232 U. S. 383, 397;
Woods v. *United States*, 279 Fed. 706, 710;
Freeman v. *United States*, 160 F. 2d 72, 74.

POINT III

As against an accused's timely challenge, an exclusory jury is no jury at all.

It is barred from status and authority by the Fifth and Sixth Amendments, and, if a state jury, by the Fourteenth Amendment.

This is true whether the exclusion is by reason of race, creed, sex, economic status or employment.

The constitutional right to an impartial jury and to due process of law implies a jury which is "truly representative of the community." An exclusory jury is, as against the timely challenge of an accused, not *de facto*, but constitutionally without status at all.

This constitutional principle was first authoritatively formulated by this Court (per Mr. Justice Black) in *Smith* v. *Texas*, 311 U. S. 128, 130, 132:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government. * * * *If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand.*" (Italics ours.)

While this *Smith* case arose under the Fourteenth Amendment, the next case wherein this Court (per Mr. Justice Murphy) reaffirmed this principle (*Glasser* v. *United States*, 315 U. S. 60) arose under "the Fifth and Sixth Amendments" (p. 84). It involved an alleged systematic

exclusion of all women (not members of the League of Women Voters) from service on federal juries, notwithstanding that in Illinois all women were legally eligible for jury service. The conviction was affirmed on the ground that the alleged exclusion was not sufficiently proved; but this Court said that under the Fifth and Sixth Amendments not only has trial by jury become a "fundamental" constitutional right "in criminal proceedings in a federal court" (p. 84), but also that, implicit in this constitutional right, are "*our notions of what a proper jury is*" (p. 85). This Court described this "notion" as having "become inextricably entwined with the idea of a jury trial" and hence with the constitutional guarantee of an "impartial jury" and, we add, consequentially with the constitutional guarantee of due process.

Inherent in this constitutional "notion" as to "a proper jury" is, to quote further from the *Glasser* case (pp. 85, 86):

> "the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. * * * Tendencies, no matter how slight, toward the selection of juries by any method other than a process that will insure a trial by a representative group are undermining processes weakening the institution of jury trial and should be sturdily resisted."

Since those decisions, this Court has steadily continued to identify the Constitution's concept of "a proper jury" as "a body truly representative of the community" with "the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions",—that is, with the substance and essence of due process of law.

Thus, in *Thiel* v. *Southern Pacific*, 328 U. S. 217, where there was revealed in a civil case in a federal court a syste-

matic exclusion of "persons who work for a daily wage", this Court (per Mr. Justice Murphy) said (p. 220):

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. * * * Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."

In *Ballard* v. *United States*, 329 U. S. 187, there was in California systematic exclusion of women from federal grand and petit juries, notwithstanding their eligibility for state juries. This Court (per Mr. Justice Douglas) sustained the claim of the convicted defendants that such exclusion violated the Fifth and Sixth Amendments, and not only reversed the conviction *but dismissed the indictment* since "the grand jury was likewise drawn from a panel improperly chosen" (p. 196).

This Court cited and quoted from the above decisions, and also expressly approved (p. 194) the dissenting opinion of Judge Denman in the court below. In that dissenting opinion, Judge Denman had said (152 F. [2d] 941, 950, 951):

> "*It is a matter of indifference whether this claim is based upon the Fifth or Sixth Amendments.* It is obvious that they have been denied due process in the jury-constituting portion of the prosecuting process if the lists are not valid under the requirements of the Sixth Amendment."

Judge Denman then quoted the above passage from the *Glasser* case, and continued (p. 951):

"This statement of the law was made in considering whether the Sixth Amendment was 'violated by the omission of all women from the grand jury and nearly all women from the trial jury lists.' It is inconceivable that the Supreme Court was speaking in vacuo. *To me the Glasser statement makes clear that today the 'impartial jury' of the Sixth Amendment has as one of its determinants the character of the grand and trial jury lists as 'truly representative of the community' with respect to the exclusion therefrom of qualified women.*" (Italics in this paragraph ours.)

In *Zap* v. *United States*, 328 U. S. 624, this Court had affirmed a decision of the Circuit Court of Appeals (151 F. 2d 100), which in turn had affirmed a conviction in a federal court in California. A petition for rehearing was denied by this Court (329 U. S. 824). Nevertheless, later, the defendant filed a second petition for rehearing, citing not only the *Glasser* and *Thiel* cases, but also the *Ballard* case, then just decided. Despite the fact that the conviction had been affirmed by this Court, this Court granted (330 U. S. 800) this second petition for rehearing, reversed the judgment of the Circuit Court of Appeals, *and dismissed the indictment*, citing *Ballard* v. *United States*, 329 U. S. 187. An examination of the record on appeal shows that the defendant had claimed at the trial that the systematic exclusion of women from the federal grand jury had violated his constitutional rights.

These cases demonstrate, beyond all dispute, that, under the Constitution, an exclusory jury is no jury at all.

POINT IV

Under the Constitution, the law cannot recognize, as between the Government and a person in jeopardy under the law, such an authority as "a *de facto* Grand Jury".

(1) As already stated (Point I, subd. E, *supra*) the appellant's brief now advances as its major premise (p. 36) that:

> "The grand jury had more than *de facto* existence, and its proceedings had legal validity."

Also, as already stated (Point I, subd. E, *supra*), this major premise is in complete contradiction of the appellant's spokesmen in the District Court. And also, as shown in Points I, II and III, *supra*, it clearly contradicts the law of the case as settled *res judicata* between these parties by the unappealed decision of March 19, 1947, and also by fundamental principles of law.

No more far-reaching and devastating blow could be struck against the constitutional safeguards protecting the citizen against governmental powers to indict for crime and to secure seizures and searches of private papers for the purpose of his or its indictment, than to uphold the Department of Justice in its present claim that the one body in which the Constitution reposes the authority to indict need not be *de jure* as a condition of the lawful exercise of such powers and of "the right to see" the citizen's papers (appellant's brief, pp. 36, 39).

(2) No decision has been cited upholding these major premises of the appellant's brief. The decisions are the very opposite.

Under the Fifth Amendment, a grand jury is a constitutional body constituting in law *the essential and exclusive authority for a valid indictment.*

As said by Chief Justice Marshall in *United States* v. *Hill* (Fed. Cas. No. 15,364, 1 Brock 156):

> "This (criminal) jurisdiction they (Federal Courts) are bound to exercise, and it can *only* be exercised, through the instrumentality of grand juries." (Italics ours.)

And as said by this Court (*per* Mr. Justice Frankfurter) in *Cobbledick* v. *United States*, 309 U. S. 323, 327:

> "The Constitution itself makes the grand jury a part of the judicial process. It must initiate prosecution for the most important federal crimes. • • • The proceeding before a grand jury constitutes 'a judicial inquiry', *Hale* v. *Henkel*, 201 U. S. 43, 66, of the most ancient lineage. See *Wilson* v. *United States*, 221 U. S. 361."

And as also said in the early case of *Ex parte Farley*, 40 Fed. 66 (p. 71):

> "It (the Fifth Amendment) meant a grand jury which was a legal body, —one impanelled by a court which had legal authority to so impanel it."

(3) Moreover, a grand jury is "a creature of statute". No group can acquire or be given legal status as a grand jury except when called into being and endowed with authority in compliance with the statute.

As said in *In re Mills*, 135 U. S. 263, 267:

> "A grand jury, by which presentments or indictments may be made for offences against the United States, is a creature of statute. It cannot be em-

panelled by a court of the United States by virtue simply of its organization as a judicial tribunal."

(4) Hence, both because of the explicit and implicit provisions of the Fifth Amendment and of the statute and rules of law governing the constituting of a real grand jury, there can be in law, as against timely challenge by an accused, no such authority as a *de facto* grand jury.

Any one may waive his constitutional rights: But, when he makes timely assertion of them (as held without question in this case, R. 84), the criminal law's processes against him must be *de jure*. That is the essence of government *by law*, and of liberty *under law*. It is the difference between the free society and the police state.

In *United States* v. *Johnson*, 123 F. 2d 111 (reversed on other grounds, 319 U. S. 503), the Circuit Court of Appeals for the Seventh Circuit said (p. 120):

"In defense of the Grand Jury proceeding, the Government relies upon a decision of this Court, *Elwell* v. *United States*, 7 Cir., 275 F. 775. While it does not expressly so contend, we assume it infers, by reason of what was said in that case, that the Grand Jury may be considered as *de facto*. While we are loath to repudiate a holding of our own court, *we are of the view that there is no such thing as a de facto Grand Jury in a Federal Court*. In the *Elwell* case, the court cites *People* v. *McCauley*, 256 Ill. 504, 509, 100 N. E. 182, which, it is true, recognizes such a Grand Jury. The latter court expressly points out, however, that a Circuit Court of Illinois has general and original criminal jurisdiction, with common law power to call or continue a Grand Jury. Its authority is not dependent upon Statute. A United States District Court, on the contrary, is of limited jurisdiction with such powers only as are expressly conferred. A Grand

Jury is 'a creature of statute.' *In re Mills, Petitioner, supra.*" (Italics ours.)

And later in its opinion the Circuit Court of Appeals said (p. 128):

> "In our study of the record and in preparing the opinion, we have endeavored to keep in mind a basic concept of American jurisprudence which, from time immemorial, has taught that *every person charged with crime, regardless of his occupation or station in life, is entitled to a fair and impartial trial upon the issue or issues tendered by a legal indictment, returned by a Grand Jury empowered to act.*" (Italics ours.)

In *United States* v. *McKay*, 45 F. Supp. 1007, the court said (p. 1015):

> "There is no such thing as a *de facto* grand jury in a Federal Court."

In *Wilson* v. *United States*, 221 U. S. 361, this Court said (*per* Mr. Justice Hughes) (p. 382):

> "Although the object of the (grand jury) inquiry may be to detect the abuses it (the corporation) has committed, to discover its violations of law and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers *to duly constituted authority, when demand is suitably made.*" (Italics ours.)

(5) All these decisions add up to the elementary principle of constitutional liberty and limitation of governmental power that officials or bodies proceeding under the criminal law, must have *de jure* authority for themselves and for their procedure if there be timely challenge.

Otherwise, as said by this Court (*per* Mr. Justice Jackson) in *Johnson* v. *United States*, 333 U. S. 10, 17:

> "Any other rule * * * would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police state where they are the law."

(6) The appellant's brief cites (p. 37) and quotes from *United States* v. *Gale*, 109 U. S. 65.

But this case has no conceivable bearing. There the defendant, without protest against the grand jury, went to trial and was convicted. All that the Court held was that he could not thereafter and for the first time move in arrest of judgment on the ground that, in impanelling the grand jury which had found the indictment, four persons were excluded from the panel under a statute making ineligible those who had taken part in the Rebellion. The defendant claimed that such statute was unconstitutional. All that the Court held was (pp. 67, 73):

> "Inasmuch as, by pleading not guilty to the indictment, and going to trial without making any objection to the mode of selecting the grand jury, such objection was *waived*. The defendants should either have moved to quash the indictment or have pleaded in abatement, if they had no opportunity, or did not see fit, to challenge the array." (Italics ours.)

But the Court was careful to add that even the doctrine of waiver could not be applied "where the proceeding is *wholly void* by reason of some fundamental defect or vice therein" (*i.e.* the empanelling of the grand jury) (p. 72).

In the present case, the defendants, instead of waiving their rights, promptly asserted them by a concededly "timely" motion to quash the indictment (R. 84), which concededly was correctly granted (Point I, subd. B, *supra*).

(7) In the same connection the appellant's brief (p. 37) cites *Kaizo* v. *Henry*, 211 U. S. 146; *Redmon* v. *Squier*, 162 F. 2d 195, 196; and *Kelly* v. *Squier*, 166 F. 2d 731.

The *Kaizo* case is without any conceivable bearing. There the defendant was indicted in the Circuit Court of Hawaii for murder. He filed a plea in abatement on the ground that certain members of the indicting grand jury were not citizens of the United States because, as he claimed, their naturalizations were defective. The Circuit Court tried and overruled this plea. Thereafter, the defendant was convicted, and the conviction was affirmed by the Supreme Court of the Territory of Hawaii. Six days before his execution, he filed a petition in the Supreme Court of the Territory for *habeas corpus*, claiming that his plea in abatement had been wrongfully overruled. On these facts the Supreme Court of the United States held that the defendant could not use the writ of *habeas corpus* as a collateral attack upon the final judgment of conviction or as a means of rearguing points of fact and law duly tried and decided in that action (p. 149).

The *Redmon* and *Kelly* cases, *supra*, also cited by the appellant (p. 37), were merely instances where, after conviction, the defendant attempted, by *habeas corpus, for the first time* to raise a claim that there had been a defect in the impanelling of the grand jury.

(8) The appellant's brief also cites (p. 38) *Blair* v. *United States*, 250 U. S. 273, 282, for the claim that "a witness" called before a grand jury "has no standing to challenge its composition."

That case also has no conceivable bearing; and, incidentally, it holds no such thing.

There the appellants had been adjudged guilty of contempt in refusing to answer certain questions before a federal grand jury. Each of the appellants were before the grand jury merely as "witnesses" and had been explicitly informed by the grand jury, through its spokesman

the United States Attorney, *"that the inquiry was not directed against him"* (p. 277). Nevertheless, they refused to answer on the ground that a federal grand jury in New York had no authority to inquire into the conduct of a campaign committee for the primary election of a United States Senator in Michigan (p. 277). *The composition or legality of the grand jury as such, was in no way challenged.* All that was held was that the witness could not refuse to answer on the alleged ground that the grand jury was inquiring into a matter beyond jurisdiction in New York. As this Court said (p. 282):

> "He (the witness) is not entitled to set limits to the investigation that the grand jury may conduct."

Here the issue is not as to the lawful limits of an investigation by a lawful grand jury but as to the authority of the body (under the Fifth Amendment and the law) to sit as a grand jury at all.

The case of *Fairfield v. United States*, 146 Fed. 508, also cited in the appellant's brief (p. 38), merely illustrates how far afield appellant's counsel is compelled to go. That case only held that in the trial of an equity action a subpoenaed witness has no standing to refuse to testify on the alleged ground that the complaint stated no case.

POINT V

Likewise, by failure to appeal and by compliance, the appellant rendered conclusive and *res judicata* the decree of February 18, 1948, directing delivery to the defendants of the photostatic copies made by the Justice Department of some of the seized and searched papers.

Moreover, that decree was right in law.

1. The indictment was dismissed and the subpoenaed papers ordered returned by final "decision" on March 19, 1947 (R. 56-70). Confirmatory orders were promptly entered (R. 70, 75). Thereby the so-called "Criminal Action No. 6055" forthwith terminated.

As already stated, the appellant regarded the decision as "correct", took no appeal, and immediately complied. (See Point I; subd. A, *supra*.)

Likewise, "the Special Grand Jury" necessarily ceased to exist the moment the decision of March 19, 1947, was rendered. Its so-called "investigation" in and for which the defendants' papers had been seized, impounded and searched by that body and by the Justice Department as its agent, also then came to a permanent end.

On April 7, 1947, and again on May 2, 1947, the defendants demanded of the Department of Justice the delivery to them of the photostatic copies made by the Department of some 8,000 of the 200,000 papers subpoenaed and impounded as aforesaid (R. 36, 44, 50, 230). Some of the papers so photostated had been put in evidence before the "Special Grand Jury" (R. 230). A third demand, in writing, was made on May 5, 1947 (R. 79, 80). These demands were not honored (R. 50).

Thereupon, on May 9, 1947, the defendants petitioned the Court for an order for the delivery of the photostats to them.*

This petition for the delivery of these photostatic copies was, in terms and of necessity, *an independent and separate proceeding*, with a new and separate docket number. It was entitled (R. 75, 76):

"DISTRICT COURT OF THE UNITED STATES

DISTRICT OF RHODE ISLAND

"In the Matter of Motion of Wallace & Tiernan Company, Inc., et al., for return of documents."	Misc. No. 5347

The petition was supported by affidavit of defendants' counsel, similarly entitled (R. 77). No counter-affidavit or other opposing proof was filed by the Department of Justice (R. 50, 82).

On September 8, 1947, in opening the hearing on this petition, the defendants' counsel said (R. 309):

> "First of all, we have in Miscellaneous No. 5347, *which is a separate proceeding*, a motion for return of certain photostatic copies of documents which are in the possession of the United States." (Italics ours.)

2. The appellant's brief, as we read it, *concedes* that the United States could have taken an appeal from this final decree in this separate and special proceeding (p. 32); and also concedes that the "reasoning" in the court's

* The like petition by the defendants Builders Iron Foundry and Chafee was filed at a somewhat later date.

opinion preceding that decree "would have supported an order of preclusion" and "gave forewarning that it would rule adversely to the Government when the issue (of preclusion) was directly involved." (p. 32).

The excuse for not appealing is altogether unrealistic in view of this admitted "forewarning" by the court; and certainly cannot now be given even the color of substance by a present belated speculation (p. 32) that on such appeal the appellees might have taken the position that the Government would not be prevented by the decree "from obtaining the documents by valid process." The motion for the delivery of the photostats and the motion to preclude were argued on *the same day* (September 8, 1947, R. 308-9); and the motion to preclude was decided on April 14, 1948 (R. 91),—to wit: before the expiration of the Government's time to appeal from the order as to the photostats entered February 18, 1948 (R. 85) (Section 2107, Title 28, U. S. C.). Furthermore, this very order as to the photostats was itself amended on April 20, 1948 (R. 86), which was *after* the decision of the preclusion order (R. 91).

Indeed, at the very time when the motions for the photostats and to preclude were simultaneously argued on September 8, 1947 (R. 308-9), the Justice Department's spokesman (Mr. Kelleher) expressly conceded that both motions rested upon and were controlled by the decision in the *Silverthorne* case that the wrongly-obtained evidence could not "be used at all", if the court held (as it thereupon did, R. 84) that "there has been an unreasonable search and seizure within the meaning of the Fourth Amendment" (R. 323, 360-1). In that same argument, defendants' counsel expressly stated that he was claiming that complete preclusion was the consequence of both motions (R. 351); and Mr. Kelleher's brief submitted on these motions conceded that in logic preclusion was the consequence of both (R. 351).

Hence, the speculation offered in the appellant's brief (p. 32) as an excuse for not appealing is purely fictional.

(3) But, quite aside from the appellant's concession, the final decree for the delivery of the photostats was clearly appealable by the United States as a matter of course.

Such a special proceeding has been held equivalent to an independent summary suit in equity. (*Essgee* v. *United States*, 262 U. S. 151, 152-3; *United States* v. *Rosenwasser*, 145 Fed. [2d] 1015, 1017, C. C. A. 9.)

Hence, the decree made therein on February 18, 1948 (R. 85) was a final decree, and was appealable to the Circuit Court of Appeals under Section 225 of Title 28, U. S. C. A. (now Section 1291 of Title 28, U. S. C.).

To quote the *Rosenwasser* case just cited (p. 1016-7):

> "Where no criminal action against him is pending at the time the moving party institutes a proceeding to suppress evidence, the proceeding is considered an independent suit in equity and the court's order therein is appealable as a final decision. *Burdeau* v. *McDowell*, 1921, 256 U. S. 465, 41 S. Ct. 574, 65 L. Ed. 1048, 13 A. L. R. 159; *Perlman* v. *United States*, 1918, 247 U. S. 7, 38 S. Ct. 417, 62 L. Ed. 950; *Cheng Wai* v. *United States*, 1942, 2 Cir., 125 F. 2d 915; *United States* v. *Poller*, 1930, 2 Cir., 43 F. 2d 911, 74 A. L. R. 1382."

4. It is also the universal holding that where, at the time when the application to suppress evidence or return papers is initiated, the criminal action for the purposes of which the evidence had been unconstitutionally seized, had not been begun *or had been dismissed*, such application is deemed an independent, separate proceeding equivalent to an independent suit in equity.

A final determination therein is appealable to the Circuit Court of Appeals.

Cogen v. *United States*, 278 U. S. 221, 225-6;
United States v. *Byoir*, 147 F. 2d 336, 337 (C. C. A. 5);
United States v. *Rosenwasser*, 145 F. 2d 1015, 1016-7 (C. C. A. 9);
In re Investigation by Attorney General, 104 F. 2d 658, 659 (C. C. A. 2);
United States v. *Poller*, 43 F. 2d 911, 912 (C. C. A. 2);
Dickhart v. *United States*, 16 F. 2d 345, 346, Court of Appeals, District of Columbia;
In re Brenner, 6 F. 2d 425 (C. C. A. 2).

To quote from the opinion in *Cogen* v. *United States*, 278 U. S. 221, *supra* (p. 225):

> "The independent character of the summary proceedings is clear, * * * *wherever the motion, although entitled in the criminal case, is not filed until after the criminal prosecution has been disposed of*, as where under the National Prohibition Act a defendant seeks, after acquittal, to regain possession of liquor seized. And the independent character of a summary proceeding for return of papers may be so clear, that it will be deemed separate and distinct, even if a criminal prosecution against the movant is pending in the same court. This was true in *Essgee Co.* v. *United States*, 262 U. S. 151, *where the petition was entitled as a separate matter* and was referred to by the court as a special proceeding." (Italics ours.)

5. In granting the petition for the delivery of the photostats, the District Court rendered its decision on February 6, 1948. That decision was entitled (R. 81):

> "In the Matter of Motions of Wallace & Tiernan Company, Inc., *et al.*, for the Return of Documents."

In that decision the District Court said as follows (R. 84):

> "It seems to me that when the grand jury turned out to be illegally constituted and the indictment was dismissed that the subpoenas amounted to unreasonable searches and seizures in violation of the Fourth Amendment * * *.
>
> "In *Johnson* v. *United States*, decided February 2, 1948 (16 L. W. 4133, 4135), the Supreme Court said:
>
> > 'Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion.' Any other rule would undermine "the right of the people to be secure in their persons, houses, papers and effects,' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.'
>
> "It is my opinion that the Government, gaining access to the documents by means of an illegal grand jury, has no 'valid basis in law for the intrusion,' which the Government committed in making the photostats of said documents and retaining possession of them."

A "decree" accordingly was entered on February 18, 1948 (R. 85); and the stay obtained by counsel for the Justice Department was terminated by order entered on April 20, 1948 (R. 86). The Department thereupon complied without appeal.

Thus, *here for the third time*, decisions of issues of law and fact became by the appellant's own course final, conclusive and *res judicata* between the same parties for all purposes, proceedings and actions; and the appellant *for a third time* even added to the finality in law finality in fact by its compliance.

Moreover, by command of Rule 41(e) of the Federal Rules of Criminal Procedure, the photostats were henceforth *not* "*admissible in evidence at any hearing or trial.*" (Italics ours.)

6. At the foot of its opinion of February 6, 1948, the Court made the following notation (R. 85):

> "Since these motions stem from Indictment No. 6055, the Clerk is ordered to make the motions, the hearings thereon, and this opinion part of the record of said indictment."

But this notation could not possibly change the facts, stated above, that the Indictment had already been dismissed *before* the petition for the delivery of the photostats was presented; and that the petition was in fact and in law an independent and separate proceeding which would and could not be converted into a non-existent something else by such a notation. (*Richfield Oil Corp.* v. *State Board*, 329 U. S. 67, 72; *Coastwise Lumber & Supply Co.* v. *United States*, 259 Fed. 847, 849, C. C. A. 2.)

7. The Department of Justice had no lawful right to circumvent the admittedly correct decree of March 19, 1947, for the immediate return of the subpoenaed papers by retaining photostatic copies thereof.

Moreover, there is not a syllable in the United States Constitution or in any statute which authorizes any such indirect means of transferring to the files of an agency or bureau of the Executive reproduction of a citizen's private papers and the permanent retention of them there.

The spirit of our Constitution and of our American Tradition cries out against such a desecration of private rights and liberties.

If the Department of Justice has the right to photostat private papers acquired without right and to retain the photostats, then we have the anomaly of a wrong becoming a right.

The settled law on this subject is thus succinctly stated in the first headnote to the decision of Judge Learned Hand in *United States* v. *Kraus*, 270 Fed. 578:

> "When papers of parties subsequently indicted are seized upon an illegal search, the papers *and all copies taken while the officers retained their illegal possession* must be returned, and any information obtained therefrom must not be used at the trial or in its preparation." (Italics ours.)

To the same effect are:

Essgee Co. of China v. *United States*, 262 U. S. 151, 156;
Silverthorne Lumber Co. v. *United States*, 251 U. S. 385;
Flagg v. *United States*, 233 Fed. 481, 486 (C. C. A. 2);
United States v. *Brasley*, 268 Fed. 59, 65;
United States v. *Spallino*, 21 F. (2d) 567, 568.

7. The prohibitions and consequent bar of the Fourth and Fifth Amendments operate as much in a civil case as in a criminal case. (*Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; *Rogers* v. *United States*, 97 F. (2d) 691, 692, C. C. A. 1; *Schenck* v. *Ward*, 24 F. Supp. 776; Rule 41e of the Federal Rules of Criminal Procedure.) (See the quotations from these decisions in Point VI, subd. K, *post*.)

POINT VI

Furthermore, the decree of April 20, 1948, in Criminal Action 6070 (instituted by Information after the dismissal of the Indictment), suppressing any evidence obtained from the documents ordered by the aforesaid decrees to be delivered to the defendants, was correct in law, and also was given finality by its very nature and by Rule 41(e) of the Rules of Criminal Procedure for the District Courts of the United States.

The failure of the Justice Department to appeal therefrom constitutes a fourth instance of *res judicata*.

1. On May 1, 1947, after the dismissal of the purported "Indictment", the Attorney-General of the United States filed an Information under the Sherman Act in phraseology and subject matter identical with the Indictment and against the same parties. This Information was thereupon docketed as "Criminal Action Number 6070" (R. 272).

In that action, the defendants, on July 25, 1947, made a motion to dismiss the "Information", or, in the alternative, for (R. 87):

> "An order precluding and restraining the United States from using *in any way or for any purpose* any knowledge, information or evidence obtained from or contained in any of the aforesaid illegally seized papers and documents." (Italics ours.)

The Motion was based on an affidavit (R. 89) and on the proceedings and decisions of the District Court discussed above (R. 90).

The grounds of the Motion were the violations of the Fourth and Fifth Amendments, the Government's failures to appeal from any of the foregoing decisions of the Dis-

trict Court, and the consequent finality thereof in law as *res judicata* and finality in fact by compliance (R. 354).

By opinion dated April 14, 1948, the District Court reviewed all the prior proceedings and the determinations made therein under the Fourth and Fifth Amendments of the Constitution of the United States; denied the motion to dismiss the Information, holding that evidence not constitutionally inhibited might be obtained "in support of the allegations in the information"; but granted the alternative relief by way of preclusion requested in paragraph 3 of the Notice of Motion (R. 91-95).

The ensuing decree of preclusion, entered April 20, 1948, was precisely in the above-quoted terms of the motion (R. 95, 96).

The Department of Justice expressly stated that it had "no objection" to the form of this decree (R. 114); recognized it to be "a final order" (R. 115); but never attempted to appeal from it. Indeed, the Department has never taken any further steps in the criminal action instituted by this "Information".

2. The appellant's brief (p. 33) cites some colloquy between the court and Mr. Kelleher, Special Assistant to the Attorney General, in which the Court stated in passing that it did not see how the entry of the decree "is going to prejudice you in some other case" (R. 126, 117, 119, 120). But the Court was careful to state, "I am not making any ruling" (R. 120), and that the appealability of the decree "isn't for this Court to say" (R. 121). The defendants' counsel expressly refused to make any concession on the subject (R. 118, 119).

In any event, the effect of a decree is not to be determined by preliminary colloquy but by the terms of the decree itself, especially when approved by the appellant as to form and recognized as "a final order" and not appealed (R. 114-5).

A

The preclusion decree of April 20, 1948, was in its scope and effect final as against the Government. The Government could have appealed therefrom.

1. Where the application to suppress is not restricted to the use of the evidence in some particular action, pending or about to be pending, but (to quote the opinion in the *Silverthorne* case) demands "that it shall not be *used at all*", a decree accordingly in such a proceeding is final as against the Government and appealable by it.

To quote the opinion of this Court in the *Cogen* case (*per* Mr. Justice Brandeis) (pp. 225-6):

> "Where the proceeding is a plenary one, like the bill in equity in *Dowling* v. *Collins*, 10 F. (2d) 62, its independent character is obvious; and the appealability of the decree therein is unaffected by the fact that the purpose of the suit is solely to influence or control the trial of a pending criminal prosecution. * * * And the independent character of a summary proceeding for return of papers may be so clear, that it will be deemed separate and distinct, even if a criminal prosecution against the movant is pending in the same court."

In the present case, the application to preclude was not limited to the Information action but sought and obtained a decree of judicial outlawry, to use the phraseology of the appellant's brief (p. 35), "having scope beyond the particular proceeding in which it is entered".

2. Moreover, there is a plain distinction between the granting of such an application and its denial.

The granting of it is final as to the Government but the denial of it may not be final as to the defendant.

Concession of this distinction is thus made in the appellant's brief (p. 34):

> "* * * the order granting the motion is in practical effect more final as to the Government than an order denying the motion would be as to appellees."

In the *Cogen* case, *supra*, the application was *denied*, with the consequent holding that the defendant could not appeal. The distinction between a denial and a grant was pointed out in the opinion (p. 224).

Hence, by its very nature, scope and consequence, the decree of April 20, 1948, went "beyond the particular proceeding in which it was entered", and was a final decree that the evidence "shall not be used at all" by the Government. (*Silverthorne* case, *supra*.) The Government could have appealed to the Circuit Court of Appeals for the First Circuit. Its failure to do so concludes it by *res judicata*.

B

Furthermore, the finality of the decree of April 20, 1948, as against the Government is conclusively confirmed by Rule 41(e) of the Rules of Criminal Procedure adopted for the very purpose of implementing the law as declared in the *Silverthorne* case, *supra*.

1. Rule 41 is entitled "Search and Seizure"; and paragraph (e) thereof is entitled "Motion for Return of Property and to Suppress Evidence."

This paragraph (e) provides, among other things, that where property "was illegally seized" in the name of law enforcement and a "motion" for its restoration and suppression of its "use as evidence" has been made and granted, "it (the property or the "evidence" supplied thereby) shall not be admissible in evidence *at any hearing or trial*." (Italics ours.)

As set forth in *United States* v. *Janitz*, 6 F. R. D. 1, 2 (appeal dismissed 161 F. (2d) 19), this Rule in its preliminary drafts provided that the evidence illegally secured "shall not be admissible in evidence at any hearing or trial *of the proceeding in connection with which the seizure occurred:*"

The limitation italicized was finally eliminated. That elimination, as well as the comprehensive character of the language remaining, show conclusively that the order made on the motion provided for in that Rule is to be conclusive not only in the proceeding in which it was entered but "at any hearing or trial" where the inhibited evidence is offered.

2. This Rule implements the Fourth and Fifth Amendments to the Constitution of the United States according to the principles declared in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 391. It does so by operating *in rem* upon the property or evidence illegally seized or acquired. It designates a special "motion" "for the return of the property and to suppress for use *as evidence* anything so (illegally) obtained", as the appointed procedure for definitive determination of the issues as to illegality and suppression; and it renders the determination thereof applicable and effective "*at any hearing or trial.*"

We need not stop to consider whether the theory of this Rule is the principle of an *in rem* proceeding, or is the principle of *res judicata*, or is the recognition of such a motion as an independent proceeding equivalent to "an independent suit in equity". (*United States* v. *Rosenwasser*, 145 Fed. [2] 1015, 1016-7 [C. C. A. 9]; *Essgee Co.* v. *United States*, 262 U. S. 151, 152-3; *Fowler* v. *Hunter*, 164 Fed. [2] 668, 669 [C. C. A. 10].) It is sufficient that, whatever the theory or theories of the Rule, the Rule's *mandate and effect* make the determination applicable

and conclusive "at any hearing or trial" wherever such issues may again arise.

3. In consequence, here *for the fourth time*, the plaintiff has allowed a decree of the District Court and the determinations of law implicit therein to become final and conclusive.

C

Aside from the conclusiveness of the decree of April 20, 1948, as *res judicata*, it was correct in law and essential to the effectiveness of the Fourth and Fifth Amendments.

Goldstein v. *United States*, 316 U. S. 114, 120;
Essgee Co. of China v. *United States*, 262 U. S. 151, 156;
Silverthorne Lumber Co. v. *United States*, 251 U. S. 385, 391-2;
Somer v. *United States*, 138 F. 2d 790, 791 (C. C. A. 2);
Rogers v. *United States*, 97 F. 2d 691, 692 (C. C. A. 1);
Flagg v. *United States*, 233 Fed. 481, 486 (C. C. A. 2);
Schenck v. *Ward*, 24 F. Supp. 776, 778.

1. The great landmark decision is *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920).

There, after an indictment of the corporation and several of its officers, representatives of the Department of Justice, acting under color of a grand jury subpoena *duces tecum* directed to the corporation for the production of its records forthwith, entered the corporation's office and, after serving the subpoena upon a representative there, carried off to the grand jury all the records

called for in the subpoena. Thereafter the Department conceded that by these acts the Fourth Amendment had been violated and returned the seized records, but kept photostatic copies of material portions thereof. Later, a second indictment to the same effect was filed, and further grand jury subpoenas were issued for the production of limited and material portions of the same records. The Department claimed that, although it could not lawfully use the evidence obtained from the records in support of the first indictment, it could do so in support of the second or a further indictment; and that the refusal of the defendant corporation to comply with the second subpoena was punishable contempt. This claim was overruled by this Court in an opinion (*per* Mr. Justice Holmes) saying (p. 392):

> "In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. 232 U. S. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court *but that it shall not be used at all.*" (Italics ours.)

Another illustration is *Rogers* v. *United States*, 97 F. 2d 691 (C. C. A. 1), where the Department of Justice unsuccessfully claimed that the evidence seized by officers of the criminal law in violation of the Fourth Amendment could nevertheless be used by the Department against their owner in *a civil suit* by the United States. In rejecting this attempt, the Circuit Court of Appeals for the First Circuit said (p. 692):

> "If a writ of subpoena is rendered invalid because of the use in framing it of evidence obtained by the government in violation of the Fourth Amendment, we think that a judgment in *a civil cause*, in the

procurement of which evidence thus illegally obtained is used, is likewise rendered invalid." (Italics ours.)

2. The appellant's brief (p. 31) cites *Zap v. United States*, 328 U. S. 624, and *in re Sana Laboratories, Inc.*, 115 F. 2d 717. Neither of these decisions has any bearing on the point for which they are cited.

In the *Zap* case, the defendant had agreed, in his contract for government business, to permit inspection of his accounts and records; and such an inspection was made during regular hours at the place of business. All that was held was that the defendant had thereby waived in advance any right to claim that the government's representatives came unlawfully on his premises and unlawfully looked at his records and by this means had possessed themselves of the information to which they testified at his trial.

The *Sana Laboratories* case presented the same situation. The defendant had, by the terms of his license for the manufacture of alcohol, agreed that his premises and business might be inspected during business hours by agents of the Treasury Department. The court held that whatever information was obtained by the agents during such an inspection was admissible.

In the latter case the court was careful to say that "knowledge gained by the Government's own wrong" *is* precluded (p. 718). That covers the instant case.

POINT VII

The principle of *res judicata* is as applicable to the decisions of a criminal court as to those of a civil court.

A final determination of an issue of law in either court is conclusive between the same parties in the other court.

The present civil complaint is a mere duplicate, on the civil side, of the Indictment and of the subsequent Information.

The charges and the wording in these three pleadings are identical, except where the respective techniques require technical differences (R. 9, 251, 272). These appellees are defendants named in all three.

Obviously, a civil action cannot be used as a medium for reargueing or appealing or annulling decrees and determinations made, consummated and performed in some other action or proceeding between the same parties. No such "*collateral attack*" is permissible. (*Fowler* v. *Hunter*, 164 F. 2d 668, 669 (C. C. A. 10); *Fowler* v. *Gill*, 156 F. 2d 565, 566 (D. C. App.).)

In other words, where an issue of law has been determined by a final decree in a criminal action and the Government has chosen not to appeal, or has allowed the time to appeal to expire, the Government cannot indirectly reopen its time to appeal by raising the same issue of law in its companion civil action between the same parties. This for three reasons:

(a) such an attempt would be an inadmissible *collateral attack*;

(b) it would violate the principle of *res judicata*; and

(c) it would be an inadmissible attempt to secure a reargument and rehearing without regard to the rules of law governing such attempts.

Frank v. *Mangum*, 237 U. S. 309, 333;
United States v. *Oppenheimer*, 242 U. S. 85, 87;
Southern Pacific Railroad v. *United States*, 168 U. S. 1, 48;
Wilson v. *United States*, 166 F. 2d 527, 529;
Fowler v. *Hunter*, 164 F. 2d 668, 669 (C. C. A. 10);
Fowler v. *Gill*, 156 F. 2d 565, 566 (D. C. App.);
United States v. *DeAngelo*, 138 F. 2d, 466, 468-9 (C. C. A. 3);
United States v. *Morse*, 24 F. 2d 1001 (C. C. A. 2);
United States v. *Meyerson*, 24 F. 2d 855, 856 (C. C. A. 2);
United States v. *Butler*, 38 Fed. 498.

POINT VIII

By reason of the foregoing, the Court below correctly denied the motions made, and vacated the subpoenas issued, by the appellant in this civil action in April and May, 1948.

The three motions which the Justice Department made in this civil action in April, 1948, all ran *solely* to about 8,000 documents (property of the defendants) which had been photostated by the plaintiff during the illegal but so-called Grand Jury Investigation and to the photostats thereof ordered returned by the decree of February 18, 1948 (R. 34, 36, 44, 46, 50, 230). (See also appellant's brief, pp. 9, 10.)

These motions in this civil action were entitled:

(1) "Motion to vacate order on motion for return of photostat copies of documents" (R. 34-6);

(2) "Motion for production of documents under Rule 34" (R. 36);

(3) "Motion for production of photostatic copies of documents surrendered by plaintiff" (R. 46).

So, likewise, the subpoenas *duces tecum* in this civil action served by the Department of Justice in May, 1948, ran *solely* to the same documents photostated by the Department as aforesaid (appellant's brief, p. 10; and R. 136-181). The defendants moved to quash these subpoenas (R. 182-192).

At the hearing on these motions on May 3, 1948, Mr. Kelleher, Special Assistant to the Attorney General, stated as follows the substance of the motions and of the Department's claim concerning them (R. 302-3):

> "In substance, if it please the Court, these motions seek to obtain for use in the civil action the documentary evidence which has been the subject of previous orders of this Court in the criminal case. * * * So that before your Honor this morning are two issues presented by these motions. First: May the Government obtain for use in the civil case the photostatic copies of documents surrendered last week? And, secondly: May the Government obtain for use in the civil case, that is, may the Government inspect and make copies of the documentary evidence from which the photostatic copies were made? * * * The basic issue, of course your Honor, this morning is the question of whether the Government, in the light of the history of these documents in the criminal case, is entitled to obtain the documents for use in the civil case."

Thus, obviously and avowedly, the appellant's aforesaid three motions, plus its aforesaid subpoenas *duces tecum*, were merely attempts in this civil action to re-

argue, appeal, re-call and annul the aforesaid determinations and decrees on the identical subject matter, allegations and issues, which had been made in the prior proceedings between the same parties and to which the plaintiff had given finality in fact and in law by compliance and failure to appeal.

Obviously also, the District Court was right in the concluding statement in its opinion of May 26, 1948, that (R. 303-4):

> "It seems to me that these motions are an attempt on the part of the Government to *reargue* in this civil action matters which have been decided in the criminal case and from which the Government did not appeal." (Italics ours.)

For all the reasons in the preceding Points hereof the District Court was right in rejecting these moves by the appellant; and, moreover, the appellant was so concluded by its previous course that it had no standing to make them.

POINT IX

The claim at the end of the appellant's brief that the "dismissal of the indictment was more than adequate to compensate appellees for any possible wrong to them" contradicts the reality.

1. On page 48 the appellant's brief says:

> "Furthermore, the appellees have already been granted redress for the one element of wrongfulness which the District Court found, the technical defect in the manner of impanelling the grand jury".

Again on page 49 the appellant's brief says:

> "Under all these circumstances, the remedy of dismissal of the indictment was more than adequate to compensate appellees for any possible wrong to them resulting from the failure to include women in the panel of grand jurors."

The fact that the Department promptly substituted for the dismissed Indictment, a Criminal Information by itself in the same identical terms, with the same identical changes, and against the same identical parties, gives a sound of hollow mockery to the above quotations.

The appellant's brief and the statements of its spokesmen in the District Court are full of concessions that both the Indictment, the Information and the complaint in this civil action were based upon the documents which, through the instrumentality of this illegal grand jury, the Justice Department compelled the defendants to produce for its inspection and use (R. 205 *et seq.*).

The prejudice to the defendants is self-evident. Their private papers have been seized and searched in reality by the Justice Department through the instrumentality of the so-called "grand jury" and have been used by the Department as a basis of two criminal proceedings and a civil action against these defendants.

2. Moreover, the claim in the appellant's brief (p. 49) that "the appellees could show no prejudice from the exclusion of women," has been flatly held to be irrelevant. (*Ballard* v. *United States*, 329 U. S. 187, 195.)

3. But, aside from the consideration of "prejudice", gross and deliberate, the violation of basic constitutional guarantees can never be brushed aside by the guardians of the Constitution on the theory of being "technical defects" comparable to mere irregularity in court procedure.

The whole struggle for the preservation of constitutional freedom is a history of watchful resistance to so-called "slight" encroachments excused as merely "technical defects."

In *McNabb* v. *United States*, 318 U. S. 332, this Court said (per Mr. Justice Frankfurter) (p. 347):

> "The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law."

In his noted dissenting opinion in *Olmstead* v. *United States*, 277 U. S. 438, Mr. Justice Brandeis said (pp. 478-9):

> "They (the makers of our Constitution) conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. * * * The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

The plea *ad misericordiam* at the close of the appellant's brief has no place in the law.

As this Court said in *Hale* v. *Henkel*, 201 U. S. 43, 68:

> "The difficulty of maintaining a case upon the available evidence is a danger which the law does not recognize. In prosecuting a case, or in setting up a defense, the law takes no account of the practical difficulty which either party may have in procuring his testimony."

POINT X

The rulings by the District Court at the so-called "trial" which the Justice Department conducted on June 2, 1948, were correct.

1. When the case was called on the trial calendar on June 2, 1948, Mr. Tuttle, counsel for the defense, demanded to know whether the plaintiff was intending to conduct a trial "in the usual sense of the word," contrary to its past assurances that it did not so intend. He stated that, otherwise, the defendants would want several months for preparation (R. 203-5).

The plaintiff's past assurances were thereupon quoted by Mr. Tuttle (R. 203-4). Briefly, they were these:

At the court hearing on May 24, 1948, in discussing the plaintiff's attitude if the case were called up for trial, its counsel said (R. 198, 203):

> "Mr. Kelleher: I wish to assure counsel and the Court that in view of the rulings of the Court announced today, *the Government does not intend to offer evidence* if a date (for trial) is granted as we have requested." (Italics ours.)

Accordingly, when, at the opening of the so-called "trial" on June 2, 1948, the defense counsel quoted the foregoing assurances on May 24, 1948, by the plaintiff's counsel, the latter again said that he was not asking for and would not conduct a trial "in the usual sense of the word" (R. 204).

The plaintiff's counsel then followed this assurance with the further assurance to the defense that it need do nothing at all in connection with the proceedings which the plaintiff was about to take and that the defendants

would not be prejudiced thereby. To quote the plaintiff's counsel (R. 204):

> "Mr. Kelleher: I think it will become clear as we proceed this afternoon that the defendants will not be prejudiced in any way by not being prepared to put witnesses on the stand or to cross-examine the witnesses at this time."

In accenting this assurance, the plaintiff's counsel further said (R. 205):

> "Mr. Kelleher: I can assure counsel they are perfectly prepared for what we are going to do this afternoon and if anything comes up and you wish a continuance, we will consent to it. I am perfectly certain you will not need it and will not request it."

2. In this so-called trial which the Justice Department then conducted, its spokesman, Mr. Kelleher, made an "Opening Statement" in which he said (R. 206-7):

> "Although the Government has other documents which it would offer in the trial of the case if the subpoenaed documents were received in evidence, and although, under such circumstances, it would adduce a limited amount of oral testimony from certain witnesses, such other evidence would not tend to support most of the basic issues of fact in the case and would be insufficient standing alone to prove preponderantly any such issue. . . .
>
> For the foregoing reasons, if the Court refuses to receive the subpoenaed documents in evidence or to take testimony as to their contents, the Government does not intend to offer any other evidence in its case."

The court below, in its decision now under appeal, quoted the above from the "Opening Statement" by Mr. Kelleher (R. 233).

In line with this "Opening Statement", Mr. Kelleher said that he "would like to file with the Court an affidavit by me" (R. 214), which he was "not treating as evidence being given under oath" (R. 215), but which "assumes as the background the record thus far made in this court" (R. 215). Defense counsel objected to the filing or receipt of the affidavit for any purpose (R. 214-8); but the Court admitted it as "nothing more" than a statement of Mr. Kelleher's plan (R. 218).

This affidavit by Mr. Kelleher repeated in substance what he had said in his "Opening Statement," and concluded (R. 231-2):

> "Furthermore, the Government has no present knowledge of the existence of other evidence sufficient to establish the violations of the Sherman Act charged by the complaint and *although conceivably such evidence might be obtained, that could only be done after an investigation coextensive in time and labor with that heretofore undertaken. In short, therefore, the Government's case in its present posture can be proved only by the subpoenaed documents*" (Italics ours.)

It was to these words in Mr. Kelleher's "Opening Statement" and in his affidavit that the District Court doubtless alluded in its decision of August 6, 1948, when it found that: "The reality here practically amounts to non-prosecution," since the Government conceded that other evidence "'might be obtained'" but that it preferred to leave the case "in its present posture" (R. 241).

3. The only other step taken by the plaintiff's counsel at this so-called "trial" was the rather unique one of calling his associate counsel, Mr. Alfred Karsted, as a "witness" (R. 210), and asking him whether, in the course of his participation in the investigation by the "Special Grand Jury" (which the plaintiff had already conceded to have been rightly held by the Court to be an illegal body,

R. 102), he had examined certain documents which the plaintiff's counsel admitted to be among those ordered by the Court to be returned to the defendants (R. 210-3).

Defense counsel objected to this questioning on the grounds that it was an improper effort to elicit hearsay and secondary evidence as to the contents of written documents; that it was an improper effort to make use of information contained in documents which had been illegally and unconstitutionally seized and used by the illegal grand jury and the Department of Justice; and that the proposed testimony would be immaterial, irrelevant and incompetent (R. 210-3). The Court thereupon sustained the objection. Thereupon the plaintiff's counsel stated that he had "no further questions" (R. 213). Since there was no cross-examination, the so-called "witness" (Mr. Karsted) left the stand (R. 213).

4. The plaintiff's counsel then followed the foregoing illusion of a trial with the announcement that "the plaintiff rests" (R. 219); and defense counsel rejoined: "Your Honor, I cannot conceive what I am called upon to say or do" (R. 219).

Notwithstanding that he had not presented any evidence (least of all, proved anything), the plaintiff's counsel then achieved a record in extraordinary and artificial applications in court, by saying (R. 220):

> "Mr. Kelleher: I urge Your Honor to enter judgment for the plaintiff and to grant the relief prayed for in the complaint."

Plaintiff's counsel then heightened the transparent artificiality of this application by refusing the Court's request for a statement of the "grounds" for so unheard-of a proposal (R. 220-1, 223), and summed up his position by this extraordinary invitation to the Court (R. 221, 223):

"Mr. Kelleher: *I am asking Your Honor to dispose of the case.* * * * All I ask your Honor is to rule." (Italics ours.)

5. The plaintiff's counsel then wound up the rather humorous day by stating that he was making a "summation", which he rhetorically concluded by saying (R. 227): "Your Honor, I request judgment for the plaintiff." Quite understandably the astonished District Court exclaimed (R. 221):

> "The Court: I never heard of such a thing, of a Court being asked to do something that was not based upon evidence."

To Mr. Kelleher's "request" for judgment for the plaintiff the defense counsel and the Court rejoined as follows (R. 227-8):

> "Mr. Tuttle: We are not resting the case in the sense that there is a prosecution which has been proved or as to which evidence has been presented. We are simply saying that we regard this as nonprosecution and that we are not—
>
> The Court: To be frank with you, gentlemen, that is what it appears to the Court at the moment. Whether I am right or not in that, I don't know, but I am going to take time to find out whether or not the Court has a right to dismiss this because of the record."

Briefs were thereupon submitted and the decision expressed in the Court's opinion of August 6, 1948, and its judgment of September 3, 1948, followed (R. 232, 376).

Its decision granted the very form of judgment which, at the hearing of May 24, 1948, Mr. Kelleher had suggested, to wit: a judgment without prejudice against the Government (R. 198).

CONCLUSION

In the event that jurisdiction is accepted and the appeal is not dismissed, the judgment should be affirmed.

Dated March 22, 1949.

Respectfully submitted,

CHARLES H. TUTTLE
LOREN N. WOOD
WILLIAM H. EDWARDS
Of Counsel.

EDWARDS & ANGELL
Attorneys for Wallace & Tiernan Company, Inc., Wallace & Tiernan Products, Inc., Wallace & Tiernan Sales Corporation, Martin F. Tiernan, William J. Orchard, Gerald D. Peet, Harold S. Hutton, Vincent Pisani and Cornelius F. Schenck.

EDWARD T. HOGAN
LAURENCE J. HOGAN
Of Counsel.

HOGAN & HOGAN
Attorneys for Novadel-Agene Corporation and Industrial Appliance Corporation.

S. EVERETT WILKINS, JR.
MATTHEW W. GORING
Of Counsel.

HINCKLEY, ALLEN, TILLINGHAST & WHEELER
Attorneys for Builders Iron Foundry, Henry S. Chafee.